

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

**JUSTIN E. FAIRFAX,**

**Plaintiff,**

**v.**

**CBS CORPORATION and CBS  
BROADCASTING INC.,**

**Defendants.**

Case No. 1:19-cv-01176

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR LEAVE TO FILE AUDIOVISUAL EXHIBITS**

In this action for defamation and intentional infliction of emotional distress, Plaintiff Justin Fairfax, the lieutenant governor of Virginia, challenges broadcasts by CBS News of its interviews with the two women who have publicly accused him of sexual assault. *See generally* Dkt. 9. Defendants CBS Corporation and CBS Broadcasting Inc. (collectively, “CBS” or “Defendants”) are filing contemporaneous with this Motion a Motion to Dismiss, accompanied by the Declaration of Matthew E. Kelley (“Kelley Decl.”) to place before the Court documents incorporated by reference in the Amended Complaint or that are subject to judicial notice. Defendants also are filing contemporaneous this motion a Motion for Attorneys’ Fees and Costs, accompanied by the Second Declaration of Matthew E. Kelley (“2d Kelley Decl.”) to place before the Court relevant documents subject to judicial notice. Because this is an action premised on the content of television broadcasts, the publications on which this action is based and a number of other exhibits are, by necessity, audiovisual materials that cannot be filed via the Court’s CM/ECF system. Accordingly, CBS respectfully requests that this Court enter an order granting Defendants leave to file with the Clerk CDs containing the audiovisual exhibits

presented in the Kelley Declaration and 2d Kelley Declaration.

All of the audiovisual exhibits to the Kelley Declaration are either incorporated by reference into the Amended Complaint or are materials of which the Court may properly take judicial notice. First, Exhibits 1, 3, 5, 7, 10, and 12 to the Kelley Declaration are copies of the broadcasts on which Plaintiff's Amended Complaint is premised, and thus are incorporated by reference. *See Schneider v. Donaldson Funeral Home, P.A.*, 733 F. App'x 641, 645 (4th Cir. 2018) (court may take judicial notice of materials incorporated by reference in the complaint). The Amended Complaint refers to and quotes from these broadcasts in paragraphs 1-2, 84, 116-120, 153-154, 159-160, 162-163, 169, 173-76, 193.

Second, Exhibits 33 and 37 to the Kelley declaration are recordings of Plaintiff's public statements about the sexual assault allegations and CBS's broadcasts, which are "not subject to reasonable dispute" and relevant to the Motion to Dismiss. *Roach v. Option One Mortg. Corp.*, 598 F. Supp. 2d 741, 746 n.8 (E.D. Va. 2009) (citation omitted), *aff'd*, 332 F. App'x 113 (4th Cir. 2009) (per curiam). These recordings also are properly considered by the Court as integral to the Amended Complaint because they have "independent legal significance" to Plaintiff's claims. *Schneider*, 733 F. App'x at 645 (quoting *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016)).

The audiovisual exhibits to the 2d Kelley Declaration include Exhibits G and O, which are video recordings of news interviews with the Plaintiff, and Exhibits H and K which are video recordings of news reports relevant to the Motion for Attorneys' Fees and Costs. All of these exhibits are subject to judicial notice because they are not subject to reasonable dispute and are relevant to the motion. *Roach*, 598 F. Supp. 2d at 746 n.8.

WHEREFORE, Defendants CBS Corporation and CBS Broadcasting Inc. respectfully request that this Court grant this Motion and enter an Order granting Defendants leave to file

physical copies on CD of the audiovisual exhibits to the Kelley Declaration.

Dated: November 1, 2019

/s/ Matthew E. Kelley  
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*Counsel for Defendants CBS Corporation  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st of November, 2019, I caused a copy of the foregoing to be filed electronically with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all interested parties.

/s/ Matthew E. Kelley

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